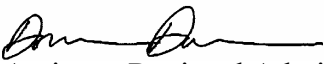


MEMO

August 10, 2005

To: PRD File

From: Donna Darm, Assistant Regional Administrator, PRD 

cc: Kirsten Erickson, NOAA General Counsel, NW
Mike Crouse, Assistant Regional Administrator, HCD

Subject: Critical Habitat Designation for Evolutionarily Significant Units (ESU) of West Coast Salmon and Steelhead – Analysis of the Benefits of Designation versus the Benefits of Exclusion of Areas Covered by Habitat Conservation Plans

This analysis was prepared to inform the agency's exercise of discretion under Section 4(b)(2) of the Endangered Species Act (ESA), which allows the Secretary to exclude any particular area from critical habitat designation if the benefits of exclusion outweigh the benefits of designation, so long as exclusion will not result in extinction of the listed species.

Background

On December 14, 2004 we published a proposed critical habitat designation with exclusions based on impacts on the economy, impacts on national security, and impacts on tribal governments (69 Fed. Reg. 74572). The proposed rule also noted we were considering additional exclusions, among them areas covered by habitat conservation plans (HCP). Although the proposed rule did not provide a detailed analysis of the benefits of designation or exclusion, it cited a supporting document that identified and mapped the HCPs then in place in the Northwest region. Table 1 lists the HCPs identified in the supporting document. The Federal Register Notice requested “[i]nformation regarding the benefits of excluding lands covered by Habitat Conservation Plans . . . , including the regulatory burden designation may impose on landowners and the likelihood that exclusion of areas covered by existing plans will serve as an incentive for other landowners to develop plans covering their lands.”

Table 1: HCPs in the Northwest Region in place at the time of the proposed designation with critical habitat potentially present.

| HCP | Type | 1000s of Acres |
|---------------------------|---------------------------------------|----------------|
| Seattle: Cedar River | Water and riparian habitat management | 90 |
| Tacoma: Green R. | Water management | 14 |
| Plum Cr: Central Cascades | Timber | 150 |
| Green Diamond (Simpson) | Timber | 262 |
| West Fork (Murray) | Timber | 49 |
| DNR State Lands | Timber | 1,400 |
| Mid-C dams (3) | Passage dam operation | NA |
| Storedahl Gravel | Gravel mining | <1 |
| Tagshinny Tree Farm | Timber | <1 |

The proposed rule also stated that we were considering excluding private commercial timber land in Washington State covered by state forest practices rules. These lands are the subject of a pending HCP between our agency and the Washington Department of Natural Resources. When completed, the HCP will cover over 8 million acres, much of which contain critical habitat for salmon and steelhead. In this analysis, we have not considered pending HCPs for exclusion because we do not want to prejudge the outcome of the HCP process. Once this HCP is completed and in force, we will complete an analysis of the benefits of designation versus the benefits of exclusion for landowners covered by the agreement who seek an exclusion.

Habitat Conservation Plans in the Statutory Context

The ESA and our implementing regulations include two important mechanisms for promoting conservation of listed salmon and steelhead. Federal agencies must ensure their actions are not likely to jeopardize species' continued existence or destroy or adversely modify designated critical habitat. This requirement protects listed salmon and steelhead on federal lands and whenever a federal permit or funding is involved in non-Federal actions, but its reach is limited. The vast majority of activities occurring in riparian and upland areas on private and state-owned lands do not require a federal permit or funding and are not reached by section 7 (in contrast to instream activities, most of which do require a federal permit).

The second important protection is that no one may "take" a listed salmon or steelhead, with take broadly defined to include "harm." The ability of the ESA to induce landowners to adopt conservation measures lies in the take prohibitions of section 9(a) and 4(d), and many landowners have chosen to put conservation plans in place to avoid any uncertainty. The primary mechanism for them to do this is to develop a habitat conservation plan, or HCP, under the provisions of section 10 of the ESA.

Section 10 of the ESA as originally enacted in 1973, contained provisions allowing for the issuance of permits authorizing the taking of listed species under very limited circumstances for private entities. However, these provisions were not flexible enough to address situations in which a property owner's otherwise lawful activities might result in an incidental take. The 1982 Amendments to the ESA sought to address this concern by including provisions under Section 10 that allowed us to issue permits authorizing the incidental take of listed species in the course of otherwise lawful activities, provided those activities were conducted according to an approved conservation plan and complied with several provisions. In adopting these amendments, Congress emphasized the importance of "creative partnerships" between the private sector and local, state and federal agencies for the protection of endangered species and habitat conservation (H.R. Rep. No. 835, 97th Congress, 2nd Session 31 (*Reprinted in* 1982 U.S. Code Congressional and Administrative News 2807, 2831)).

To receive a permit under Section 10, a landowner must develop a habitat conservation plan (HCP) that meets several criteria. The HCP must specify the impact likely to result from take, what steps the applicant will take to minimize and mitigate such impacts, and the funding available to implement such steps. The applicant must have considered alternative actions and explained why other alternatives are not being pursued, and we may require additional actions necessary or appropriate for the purposes of the plan. Before an HCP can be finalized, we must conclude that any take associated with

implementing the plan will be incidental, that the impact of such take will be minimized, monitored and mitigated, that the plan is adequately funded, and that the take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The HCP undergoes environmental analysis under the National Environmental Policy Act and we conduct a section 7 consultation with ourselves to ensure granting the permit is not likely to jeopardize the continued existence of the HCP-covered species or destroy or adversely modify designated critical habitat.

Because HCPs provide an important, voluntary mechanism to secure conservation of listed salmon and steelhead on private and state-owned lands, we have since 1994 actively sought to promote the HCP program by developing incentives for landowners. One of the most important was the “No Surprises” policy, which we adopted in August of 1994 (63 FR 8859, Feb 23, 1998). In this Final Rule, we elaborated on our understanding of congressional intent and on our view of the value of the HCP program generally:

Congress thus envisioned and allowed the Federal government to provide regulatory assurances to non-Federal property owners through the section 10 incidental take permit process. Congress recognized that conservation plans could provide early protection for many unlisted species and, ideally, prevent subsequent declines and, in some cases, the need to list covered species.

The Services decided that a clearer policy regarding the assurances provided to landowners entering into an HCP was needed. This need prompted the development of the No Surprises policy, which was based on the 1982 Congressional Report language and a decade of working with private landowners during the development and implementation of HCPs. The Services believed that non-Federal property owners should be provided economic and regulatory certainty regarding the overall cost of species conservation and mitigation, provided that the affected species were adequately covered by a properly functioning HCP, and the permittee was properly implementing the HCP and complying with the terms and conditions of the HCP permit in good faith. A driving concern during the development of the policy was the absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities.
63 FR 8859 (Feb. 23, 1998)

Our experience working with private landowners, as described above and in subsequent implementation of the HCP program, has informed our balancing of benefits of excluding or including HCP-covered lands in critical habitat designation.

Impacts of designation

The primary effect of critical habitat designation is that it imposes the requirement on federal agencies to ensure their actions are not likely to destroy or adversely modify the designated habitat. The impact of designating critical habitat on non-federal lands covered by an approved HCP or other type of conservation agreement depends upon the type and extent of federal activities expected to occur in that area in the future. Activities may be initiated by the landowner, such as when the landowner seeks a permit for bank armoring, water withdrawal or dredging. Where the area is covered by an HCP, the

activity for which a permit is sought may or may not be covered by the HCP. For example, an HCP covering forestry activities may include provisions governing construction of roads, but may not include provisions governing bank armoring or pesticide application. The activity may be initiated by the federal agency without any landowner involvement, such as when a federal agency is involved in building a road or bridge, dredging a navigation channel, or applying a pesticide on federal land upstream of the HCP-covered area.¹

The designation of critical habitat may also have impacts that are unrelated to section 7's requirements. For example, state or county environmental laws or regulations may contain provisions that are triggered if a state- or county-regulated activity occurs in federally-designated critical habitat. Another possibility is that critical habitat designation could have "stigma" effects, or impacts on the economic value of private land that are not attributable to any direct restrictions on the use of the land (cite economics report).

Benefits of designation versus exclusion generally

Landowners often are opposed to a critical habitat designation on their land. We received numerous comments on the benefits of designation or exclusion of lands covered by HCPs generally. Several commenters asserted that landowners frequently view designation of critical habitat as imposing a burden and exclusion from critical habitat as removing that burden. Many commenters also asserted that excluding lands covered by HCPs would strengthen the federal-private relationship.² Benefits of exclusion generally cited in the comments included: avoiding damage to, or enhancing, the relationship between the HCP partner and our agency; reducing the regulatory burden imposed by the ESA as well as state and local requirements such as Washington's State Environmental Policy and Growth Management Acts; reducing uncertainty associated with these regulatory requirements; and providing incentives to other landowners to seek agreements with us for conserving salmon and steelhead.

We also received comments on the benefits of designation or exclusion of particular areas covered by current HCPs. Most of the comments on particular areas came from entities with HCPs currently in place or pending completion. Of those, the City of Seattle noted the benefits of designation and stated that it entered into its HCP not to avoid designation but "because it is a useful mechanism by which to formulate and implement a comprehensive, scientifically-based conservation strategy." This HCP partner "therefore welcome[d] the designation."

¹ In its comments on the proposed rule, one current HCP partner, Hancock Forest Management, acknowledged that such activities might occur and cited examples of activities potentially taken by landowners: "rights-of-way or easements across federal lands to access private lands, a U.S. Army Corps of Engineers 404 permit under the Clean Water Act to build in-water structures, a National Pollution Discharge Elimination System Permit under the Clean Water Act for a forestry-related point source, to exchange lands with a federal agency, an incidental take permit under section 10(a)(1)(B) of the ESA, or federal funding to implement land management practices."

² These commenters included the Hancock Forest Management (which has an HCP, but not within critical habitat); the Washington Forest Protection Association (representing private commercial timberland owners in Washington State); biologists with Plum Creek Timber and Chelan Public Utility District (two entities with HCPs); the Association of Washington Businesses; and the National Association of Homebuilders.

In contrast, the comments of three landowners with current HCPs provided evidence that exclusion is likely to enhance our relationship with these landowners, which in turn will promote our ability to work effectively together to implement the HCP. These three landowners also expressed the view that exclusion from critical habitat on their lands would encourage other landowners to seek conservation agreements such as HCPs with us. They believed that benefits of exclusion are 1) avoiding damage to, and even enhancing, a relationship that benefits the listed species and 2) encouraging similar relationships with other landowners (Attachments 2-4). The Washington Department of Natural Resources comments applied both to its current HCP covering state lands and its pending application for an HCP that covers all non-federal commercial timber land in Washington State.

These entities also commented that designation of critical habitat would impose an unnecessary regulatory burden on the covered lands. Green Diamond Resources Company felt that exclusion would give the Company greater economic and regulatory certainty regarding their ESA liability. West Fork Timber Company believed that critical habitat designation would be duplicative with protections under their existing HCP and a disincentive for nearby forest landowners to pursue HCPs. Washington Department of Natural Resources did not directly cite regulatory burdens the State would experience as a result of designation, but noted “additional regulatory actions by the Federal government would erode the cooperative nature with landowners who have already voluntarily entered into a HCP.”

Based on this information, we concluded that some landowners with current HCPs view exclusion as having benefits to them and to our relationship; that some landowners with current HCPs do not view exclusion as benefiting them; and that some landowners contemplating a conservation agreement with us may view our exclusion of current HCPs as an incentive to seek HCPs on their land. On the evidence before us, therefore, we could not draw the conclusion that all landowners with HCPs view designation of critical habitat as interfering with our relationship. We could draw that conclusion only with respect to the landowners who raised concerns – Washington Department of Natural Resources, Green Diamond Resources Company, and West Fork Timber Company. Where an HCP partner has affirmatively requested designation, exclusion is likely to harm rather than benefit the relationship. Where an HCP partner has remained silent on the benefit of exclusion of its land, we will not assume that exclusion will enhance the relationship. Similarly, we do not believe it provides an incentive to other landowners to seek an HCP if our exclusions are not in response to an expressed landowner preference.

In the discussion below we therefore analyze the benefits of designation versus the benefits of exclusion only with respect to these three landowners.

Balancing Benefits of Designation against Benefits of Exclusion

In analyzing the benefits of designating these HCP-covered areas, we must consider the number of stream miles affected and the number and type of federal activities expected to occur in the area that would likely undergo a section 7 consultation. We must also consider which federal activities are covered by the HCP and which are not, and the extent to which a section 7 consultation on that particular activity would result in beneficial changes to the proposed action over and above what would be obtained under the HCP.

In analyzing the benefits of excluding these HCP-covered areas, we must consider the value of the HCP for species conservation and the importance of its ongoing implementation. We must also consider the extent to which the landowner views exclusion as enhancing our ongoing partnership. An additional benefit of exclusion may be that the landowner or a federal agency will avoid economic costs that would result if a planned activity must be altered to avoid adverse modification of the affected habitat. Our analysis revealed only minor economic impacts from changes in federal activities based on section 7 consultations on these three HCP-covered lands. We therefore considered the economic benefits of exclusion to be slight.

Throughout our analysis in developing recommendations for critical habitat designation, we have examined the “coextensive” impact of critical habitat designation, that is, “the entire impact of applying the adverse modification provision of section 7, regardless of whether the jeopardy provision alone would result in the identical impact” (69 Fed. Reg. at 74625). We adopted this approach after examining our extensive consultation record and concluding we could not discern a difference between applying the “jeopardy” and “adverse modification” provisions of section 7. In keeping with our analysis throughout the section 4(b)(2) process, if we identify coextensive economic benefits of exclusion in this analysis, we will note they are to be balanced against a corresponding coextensive benefit of designation (that is, the benefit of applying the adverse modification prohibition, as if the jeopardy provision were not available).

Green Diamond Resources Co.

The Green Diamond HCP covers forestry activities on 262,000 acres of land containing approximately 20 total stream miles of Puget Sound Chinook habitat in two watersheds. The HCP extends for a term of 50 years and has been in place since 1999. This HCP is unique in addressing Clean Water Act requirements in addition to ESA conservation measures. It covers forestry activities including forest road management and timber harvest actions and ensures they will be conducted in ways that benefit fish habitat. Important protections include restrictions on timber harvest on unstable slopes and in a buffer zone along fish-bearing streams. Restricting timber harvest on unstable slopes and improving road management will reduce the amount of sediment in these streams, to the benefit of salmon and steelhead habitat. Restricting timber harvest in the riparian zone will moderate stream temperatures and over time create late successional conditions along these streams that result in a high level of ecological function of the riparian and stream habitat to support salmon and steelhead conservation.

Another unique aspect of this HCP is the level of information the landowner had about conditions across its land. Because of this the HCP contains very specific prescriptions that are directly tied to conditions (such as channel types) in each area. The intensive and dynamic nature of the management occurring under this HCP requires us to have regular ongoing interactions with the landowner. These interactions allow us not only to monitor the effectiveness of the HCP but also to learn about the effects of applying various management practices in a forested environment.

To determine the benefits of designating streams within the Green Diamond HCP boundaries, we considered the number of stream miles, their conservation value, and the type and number of federal agency actions expected to occur that would likely undergo a

section 7 consultation. For this HCP, there are approximately 15 stream miles in the Skokomish watershed rated as having a high conservation value, and 5 stream miles in the Kennedy-Goldsboro watershed rated as having a low conservation value. Our analysis predicted there were not likely to be any federal activities affecting these areas that would undergo a section 7 consultation. (The checkerboard pattern of HCP lands with the Olympic National Forest, and the Forest's emphasis on the Skokomish watershed for sediment remediation and watershed restoration are factors that lead us to expect several, but not more than 10, section 7 consultations over the next decade.)

The benefit of excluding this area from designation is that it may enhance our relationship with the landowner and may provide an incentive to other landowners to seek conservation agreements with us. Green Diamond Resources Co. has indicated that it views designation as a burden and views exclusion from critical habitat as a reward for applying conservation measures on its land. This HCP provides important benefits to listed salmon (as described above) and its ongoing successful implementation will provide benefits to fish conservation that would otherwise be difficult to obtain on privately owned forest land. Based on information received during the public comment period, we conclude that exclusion of critical habitat within the boundaries of this HCP will enhance our relationship with this HCP partner, and that this enhanced relationship will likely benefit salmon conservation. Exclusion of these HCP-covered lands may also serve as an incentive to other landowners to seek conservation agreements with us and generally benefit our program to promote voluntary conservation agreements on non-federal lands.

Based on the foregoing analysis, I conclude that the benefits of excluding the stream miles within the boundaries of the Green Diamond Resources HCP outweigh the benefits of designating those lands because:

- The landowner views exclusion as beneficial to our ongoing relationship
- The successful future implementation of this HCP depends in part upon our relationship with the landowner
- This particular HCP results in management actions that are beneficial to conservation of the listed species in a manner that is not available through section 7 consultation
- Our analysis shows few federal activities likely to occur in this area, thus reducing the benefit of designation
- Implementation of this HCP, and our participation in its implementation in partnership with the landowner, allows us to learn more about the relationship between management activities and habitat conditions, and the relationship between habitat conditions and salmon and steelhead conservation
- Excluding this area is likely to have offsetting conservation benefits for all of the listed ESUs by providing incentives to other landowners to seek voluntary conservation agreements with us; and
- Excluding this area is likely to have benefits generally for our policy of promoting voluntary conservation agreements on non-federal lands.

Further analysis is necessary to determine whether excluding these lands will result in extinction of any of the ESUs, after taking into consideration the conservation needs of the ESUs and any other potential exclusions being considered for military areas.

West Fork Timber Co.

The West Fork Timber HCP covers forestry activities on 49,000 acres of land containing less than one stream mile of lower Columbia River Chinook habitat in one watershed and approximately 15 miles of lower Columbia River steelhead habitat in two watersheds. The HCP extends for a term of 100 years and has been in place since 1995. This was the first multi-species timber HCP developed and also the first to require assistance and approval by both the U.S. Fish and Wildlife Service and NMFS. The HCP provides for leaving at least 10 percent of the Company's tree farm in non-harvest reserves for the next 100 years. The reserves will take the form of riparian buffers averaging at least 100 feet on each side of all fish-bearing streams, for at least 50 feet along the lowest 1,000 feet of perennial non-fish streams, and where necessary for protection of potentially unstable slopes. Important protections provided by the HCP include restrictions on timber harvest on unstable slopes, non-harvest reserves for least 10 percent of the Company's tree farm for the next 100 years, and riparian buffers averaging at least 100 feet on each side of all fish-bearing streams. Restricting timber harvest on unstable slopes and improving road management will reduce the amount of sediment delivered to these streams, to the benefit of salmon and steelhead habitat. Restricting timber harvest in the riparian zone is already proving effective at moderating stream temperatures and effects of debris flows and over time will create late successional conditions along these streams that result in a high level of ecological function of the riparian and stream habitat to support salmon and steelhead conservation.

West Fork Timber has conducted watershed analyses for the HCP area and management prescriptions resulting from this process will result in less erosion into fish streams and improve long-term conditions of riparian areas. The HCP also includes stream and wetland surveys, restoration activities, and monitoring to verify and validate the effectiveness of the HCP conservation measures. The landowner has conducted a routine 5-yr review of watershed analyses for this HCP and has discussed results of the first 5 years of effectiveness-monitoring with NMFS and with the U.S. Fish and Wildlife Service. These interactions allow us not only to monitor the effectiveness of the HCP but also to learn about the effects of applying various management practices in a forested environment.

To determine the benefits of designating streams within the West Fork Timber HCP boundaries, we considered the number of stream miles, their conservation value, and the type and number of federal agency actions expected to occur that would likely undergo a section 7 consultation. For this HCP, there are two watersheds with habitat areas under consideration as critical habitat. The Tilton River watershed was rated as having a medium conservation value and the HCP lands within it overlap with approximately 15 stream miles occupied by lower Columbia steelhead and less than one mile occupied by lower Columbia River Chinook salmon. The Cowlitz Valley Frontal watershed was rated as having a high conservation value and HCP lands overlap with less than one stream mile occupied by lower Columbia steelhead (and none for Chinook). Our analysis predicted there were not likely to be any federal activities affecting these areas that would undergo a section 7 consultation. The entire HCP area is undeveloped and managed only for industrial timber production.

The benefit of excluding this area from designation is that it may enhance our

relationship with the landowner and may provide an incentive to other landowners to seek conservation agreements with us. West Fork Timber Company has indicated that it views designation as unnecessary and unwarranted on its land. This HCP provides important benefits to listed salmon (as described above) and its ongoing successful implementation will provide benefits to fish conservation. Based on information received during the public comment period, we conclude that exclusion of critical habitat within the boundaries of this HCP will enhance our relationship with this HCP partner, and that this enhanced relationship will likely benefit salmon conservation. Exclusion of these HCP-covered lands may also serve as an incentive to other landowners to seek conservation agreements with us and generally benefit our program to promote voluntary conservation agreements on non-federal lands.

Based on the foregoing analysis, I conclude that the benefits of excluding the stream miles within the boundaries of the West Fork Timber Company's HCP outweigh the benefits of designating those lands because:

- The landowner views exclusion as beneficial to our ongoing relationship
- The successful future implementation of this HCP depends in part upon our relationship with the landowner
- This particular HCP results in management actions that are beneficial to conservation of the listed species in a manner that is not available through section 7 consultation
- Our analysis shows no federal activities likely to occur in this area, thus reducing the benefit of designation
- Implementation of this HCP, and our participation in its implementation in partnership with the landowner, allows us to learn more about the relationship between management activities and habitat conditions, and the relationship between habitat conditions and salmon and steelhead conservation; and
- Excluding this area is likely to have benefits generally for our policy of promoting voluntary conservation agreements on non-federal lands.

Further analysis is necessary to determine whether excluding these lands will result in extinction of any of the ESUs, after taking into consideration the conservation needs of the ESUs and any other potential exclusions being considered for military areas.

Washington Department of Natural Resources

The Washington Department of Natural Resources HCP covers forestry activities on over one million acres of land in 52 watersheds scattered across western Washington State. Collectively the areas contain 129 stream miles occupied by the following listed ESUs: Puget Sound Chinook, Hood Canal summer-run chum, Ozette Lake sockeye, Columbia chum, Lower Columbia Chinook, steelhead and coho. The HCP extends for a term of 70 years and has been in place since 1997. It covers forestry activities including forest road management and timber harvest actions and ensures they will be conducted in ways that benefit fish habitat. Important protections include restrictions on timber harvest on unstable slopes and in a buffer zone along fish-bearing streams. Restricting timber harvest on unstable slopes and improving road management will reduce the amount of sediment in these streams, to the benefit of salmon and steelhead habitat. Restricting timber harvest in the riparian zone will moderate stream temperatures and over time create late successional conditions along these streams that result in a high level of

ecological function of the riparian and stream habitat to support salmon and steelhead conservation.

In contrast to the Green Diamond Resources HCP, which covers a relatively small area about which the landowner has a great deal of information, the HCP with Washington covers a very large and scattered area and less information is available. For this reason, the HCP has more general and more restrictive provisions for timber management practices. Because of this, and because of the extensive nature of the management occurring under this HCP, we have regular ongoing interactions with the landowner. These interactions allow us not only to monitor the effectiveness of the HCP but also to learn about the effects of applying various management practices in a forested environment.

To determine the benefits of designating streams within the Washington Department of Natural Resources HCP boundaries, we considered the number of stream miles, their conservation value, and the type and number of federal agency actions expected to occur that would likely undergo a section 7 consultation. Table 2 shows the habitat that would be affected by a designation on HCP lands (note that some HCP lands overlap with multiple ESUs) and Table 3 shows the types of federal activities in that area likely to undergo section 7 consultation.

Table 2: Number of stream miles and nearshore miles of habitat intersecting with Washington Department of Natural Resources lands.

| ESU and Occupied Miles (Occupied stream miles) | Stream miles overlapping with HCP lands | | | HCP lands overlap as % of total stream miles occupied |
|--|---|----|--|---|
| | <i>Conservation Value</i> HighMedLow | | | |
| 1. Puget Sound Chinook Salmon (2,216) | 55 | 23 | | 3.5% |
| 2. Lower Columbia River Chinook Salmon (1,655) | 87 | 75 | | 10% |
| 3. Hood Canal Summer-run Chum Salmon (88) | 4 | 1 | | 6% |
| 4. Columbia River Chum Salmon (715) | 4 | | | <1% |
| 5. Ozette Lake Sockeye Salmon (40) | 2 | | | 5% |
| 6. Lower Columbia River Steelhead (2,673) | 83 | 26 | | 4% |

Table 3. Number and type of federal activities likely to occur on HCP lands within critical habitat of each ESU.

| ESU | Mining | Utility | Dredging | Instream Activities | Development | National Pollutant Discharge Elimination System | Transportation | Non-Hydro Dams | Hydro Dams |
|--|--------|---------|----------|---------------------|-------------|---|----------------|----------------|------------|
| 1. Puget Sound Chinook Salmon | | | 2 | 15 | 2 | 21 | 4 | | |
| 2. Lower Columbia River Chinook Salmon | | | | 5 | | | | | |
| 3. Hood Canal Summer-run Chum Salmon | | | | | | | | | |
| 4. Columbia River Chum Salmon | | | | 5 | | | | | |
| 5. Ozette Lake Sockeye Salmon | | | | | | | | | |
| 6. Lower Columbia River Steelhead | | | | 5 | | | | | |

The benefit of excluding this area from designation is that it will enhance our relationship with the landowner and may provide an incentive to other landowners to seek conservation agreements with us. The Washington Department of Natural Resources has indicated that it views designation as a burden and views exclusion from critical habitat

as a reward for applying conservation measures on its land. This HCP provides important benefits to listed salmon (as described above) and its ongoing successful implementation will provide benefits to fish conservation that would otherwise be difficult to obtain on non-federal forest land. Based on information received during the public comment period, we conclude that exclusion of critical habitat within the boundaries of this HCP will enhance our relationship with this HCP partner, and that this enhanced relationship will benefit salmon conservation. Exclusion of these HCP-covered lands may also serve as an incentive to other landowners to seek conservation agreements with us and generally benefit our program to promote voluntary conservation agreements on non-federal lands.

Based on the foregoing analysis, I conclude that the benefits of excluding the stream miles within the boundaries of the Washington Department of Natural Resources HCP outweigh the benefits of designating those lands because:

- The landowner views exclusion as beneficial to our ongoing relationship
- The successful future implementation of this HCP depends in part upon our relationship with the landowner
- This particular HCP results in management actions that are beneficial to conservation of the listed species in a manner that is not available through section 7 consultation
- There are very few federal activities predicted to occur in these areas that are likely to undergo section 7 consultation (five or fewer per year, with the exception of Puget Sound Chinook salmon)
- Implementation of this HCP, and our participation in its implementation in partnership with the landowner, allows us to learn more about the relationship between management activities and habitat conditions, and the relationship between habitat conditions and salmon and steelhead conservation
- Excluding this area is likely to have offsetting conservation benefits for all of the listed ESUs by providing incentives to other landowners to seek voluntary conservation agreements with us; and
- Excluding this area is likely to have benefits generally for our policy of promoting voluntary conservation agreements on non-federal lands.

Further analysis is necessary to determine whether excluding these lands will result in extinction of any of the ESUs, after taking into consideration the conservation needs of the ESUs and any other potential exclusions being considered for military areas.

Attachments:

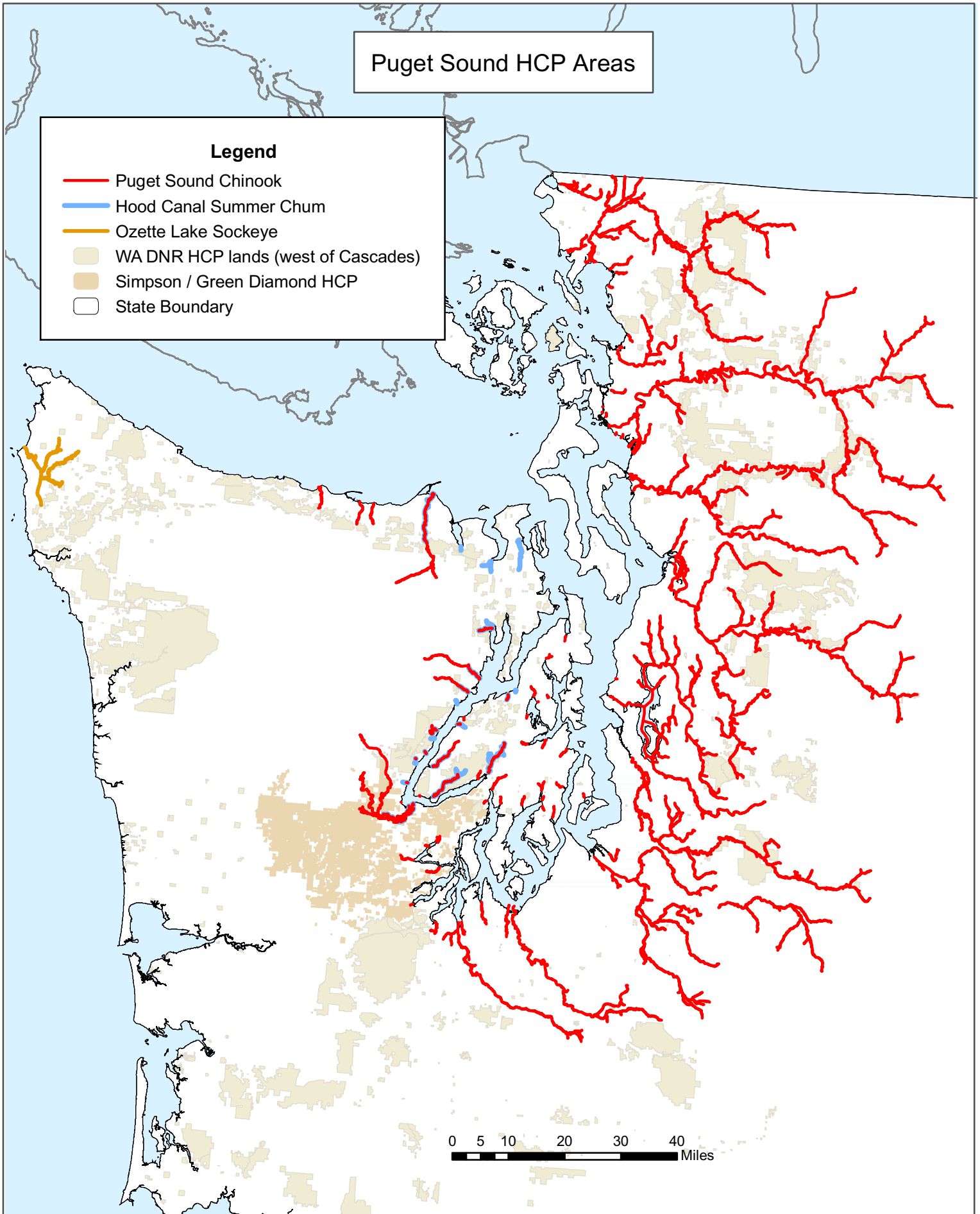
- (1a&b) Maps showing overlap of salmon and steelhead habitat areas with HCP lands of Washington Department of Natural Resources, Green Diamond Timber Company, and West Fork Timber Company
- (2) Comments of Washington Department of Natural Resources
- (3) Comments of Green Diamond Timber Company
- (4) Comments of West Fork Timber Company

Puget Sound HCP Areas

Legend

- Puget Sound Chinook
- Hood Canal Summer Chum
- Ozette Lake Sockeye
- WA DNR HCP lands (west of Cascades)
- Simpson / Green Diamond HCP
- State Boundary

0 5 10 20 30 40
Miles

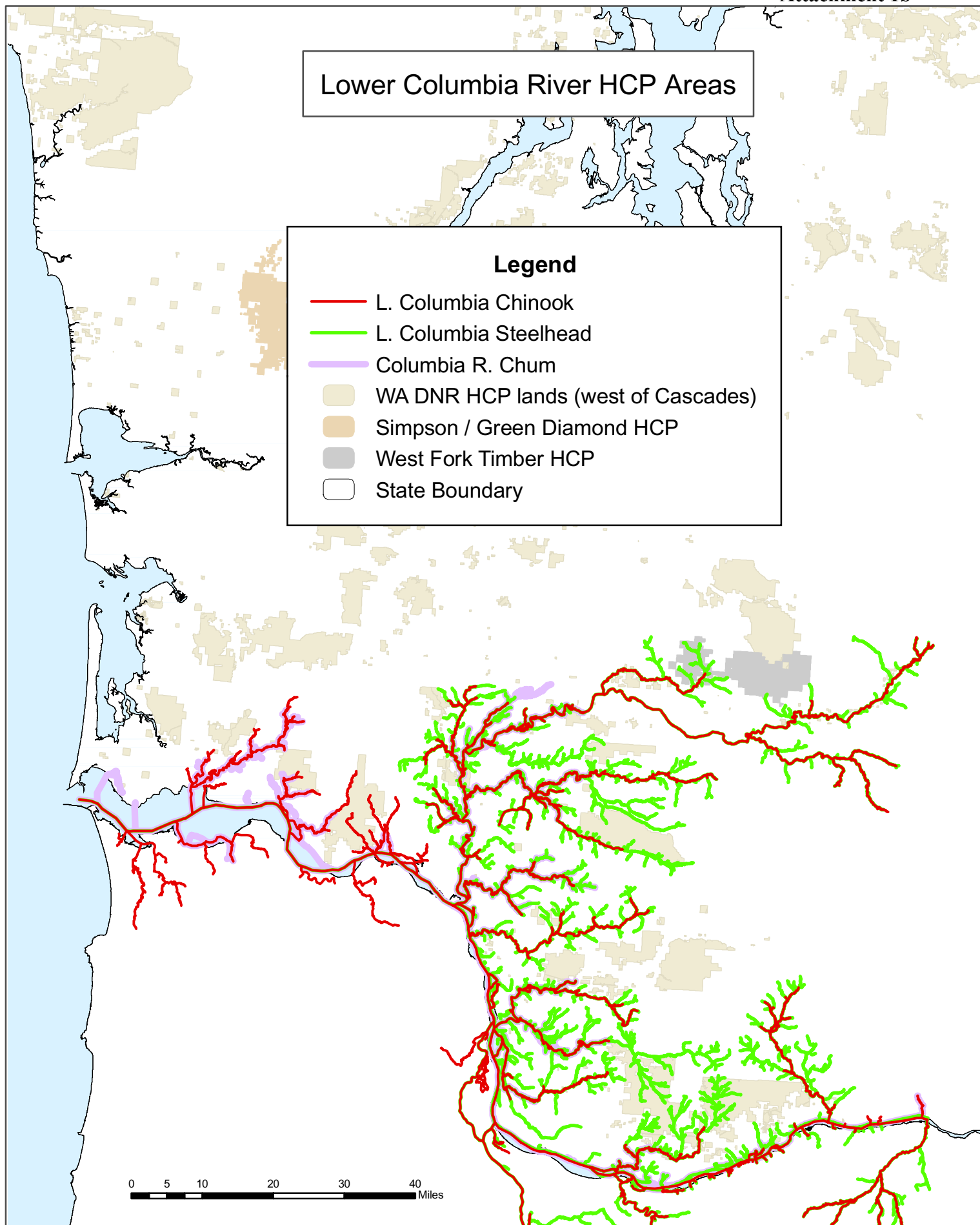


Lower Columbia River HCP Areas

Legend

- L. Columbia Chinook
- L. Columbia Steelhead
- Columbia R. Chum
- WA DNR HCP lands (west of Cascades)
- Simpson / Green Diamond HCP
- West Fork Timber HCP
- State Boundary

0 5 10 20 30 40 Miles

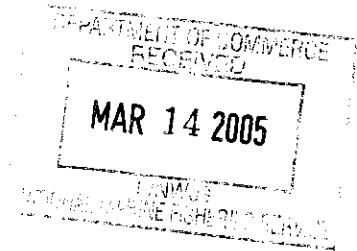




WASHINGTON STATE DEPARTMENT OF
Natural Resources

DOUG SUTHERLAND
Commissioner of Public Lands

March 4, 2005



Chief
Protected Resources Division
NOAA Fisheries
525 NE Oregon Street, Suite 500
Portland, OR, 97232-2737

Docket No. 030716175-4327-03; I.D. No. 070303A
RIN No. 0648-AQ77

Dear Sir or Madam:

Thank you for the opportunity to comment on the National Oceanic Atmospheric Administration (NOAA) Fisheries' proposed rules for Endangered and Threatened Species Designation of Critical Habitat for 13 Evolutionarily Significant Units (ESUs) of Pacific Salmon (*Oncorhynchus* spp.) and Steelhead (*O. mykiss*) in Washington, Oregon, and Idaho as presented in the Federal Register, I.D. No. 070303A.

Pursuant to the NOAA Fisheries' request for comment, the Washington Department of Natural Resources (WDNR) requests an exclusion from critical habitat designation for lands covered by existing Habitat Conservation Plans (HCPs).

As stated in the proposed rule, Section 3 of the Endangered Species Act (ESA) defines critical habitat as those habitats "(5)(A)(i) ...within the geographical area occupied by the species, ... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection;" Existing management protections currently in place on forestlands covered under the WDNR State Lands HCP exceed the level of protection that would occur under critical habitat designations, making "additional special management considerations or protection" for salmonid habitat unnecessary. The proposed rule also states "... in recent years the Federal government and many non-federal landowners have adopted many changes in land and water management practices that are contributing significantly to protecting and restoring habitat for listed species... the need for designating such areas as critical habitat is diminished correspondingly." WDNR strongly concurs with this statement, and submits that HCPs are likely the best form of voluntary special management consideration or protection for listed species on non-federal lands. NOAA would not likely secure additional conservation benefit for listed species by designating critical habitat on HCP lands. In fact, designating critical habitat on HCP lands - which have already undergone extensive environmental review and section 7 consultation - could have the unintended consequence of damaging cooperative relationships that have been established with landowners who have already entered into an HCP or who may be considering doing so.

Chief, Protected Resources Division
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Page 2

WDNR's request is consistent with the findings of the Department of the Interior's U. S. Fish and Wildlife Service (USFWS) for Designation of Critical Habitat for the Klamath River and Columbia River Populations of Bull Trout (50 CFR Part 17 in Federal Register Vol. 69, No 193). In the case of bull trout in the Klamath and Columbia Rivers, the USFWS excluded critical habitat designations for lands covered by an existing HCP "*...providing that HCP specifically and adequately covers species for which critical habitat has been designated.*" The USFWS determined they "*...anticipate little additional regulatory benefits from including these areas in critical habitat beyond what is already provided by the existing section 7 nexus...*"

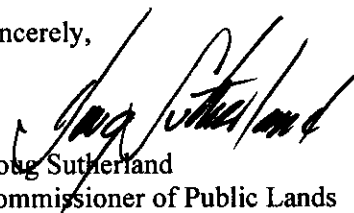
WDNR's enclosed comments describe the benefits of existing HCPs, in particular the WDNR State Lands HCP, which is currently the largest HCP in the state. As is the case for most federally approved HCPs, the section 7 consultation process for the State Lands HCP was much more extensive than the section 7 consultation process resulting from critical habitat designation. Additionally, the WDNR State Lands HCP includes voluntary restoration efforts in the form of a Riparian Forest Restoration Strategy, which would not be required under a critical habitat designation.

As you may know, the Services have released for public comment a draft HCP and draft environmental impact statement (EIS) covering the Washington Forest Practices Regulatory Program. The EIS has been prepared by the Services, which analyzes the environmental effects of the draft Forest Practices HCP. The Aquatic Resources Division of WDNR has also begun development of an HCP for activities on state-owned aquatic lands as well as management of the wild geoduck fishery and state-owned geoduck habitat. We would expect that lands covered under future approved HCPs would also be excluded from critical habitat designation upon receipt of incidental take permits (ITPs) and executed Implementation Agreements (IAs). Enclosed, please find WDNR's detailed comments specific to this request for exclusion.

As described further in the enclosed comments, the benefits of excluding HCP lands from critical habitat designations far exceed the benefits of including these lands. Therefore, WDNR requests that NOAA Fisheries exclude these areas from final critical habitat designations.

Thank you again for the opportunity to comment on the proposed rule.

Sincerely,



Doug Sutherland
Commissioner of Public Lands

Enclosure

C: Pat McElroy, Executive Director of Regulatory Programs
Fran McNair, Aquatics Steward
Bruce Mackey, Lands Steward

WDNR Enclosure – Detailed Comments

The following comments provide details pertaining to WDNR's letter dated March 14, 2005 regarding Docket No. 030716175-4327-03; I.D. No. 070303A. The benefits of excluding HCP lands from critical habitat designations far exceed the benefits of including these lands. Therefore, WDNR requests that NOAA Fisheries exclude these areas from final critical habitat designations. WDNR's justification for this request is outlined below.

Benefits of Excluding Lands Covered by Habitat Conservation Plans

Section 10(a)(1)(B) of the Endangered Species Act (ESA) authorizes NOAA Fisheries to issue non-Federal entities a permit for the incidental take of endangered and threatened species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but that may result in the incidental taking of a listed species. The ESA specifies that an application for an incidental take permit must be accompanied by a conservation plan, and specifies the content of such a plan. The purpose of such an HCP is to describe and ensure that the effects of the permitted action on covered species are adequately minimized and mitigated, and that the action does not appreciably reduce the survival and recovery of the species. However, as an added benefit of HCPs, many landowners voluntarily contribute to habitat restoration efforts, which is not required under the ESA. Therefore, for lands covered by federally approved HCPs, existing management protections are sufficient to conserve both threatened and endangered species. Thus special management considerations or protection in the form of critical habitat designations are not required to preserve physical or biological features essential to the conservation of the species in these areas.

Within Washington State, there are currently eight approved Habitat Conservation Plans covering aquatic species, including the WDNR State Lands HCP. There are also several HCPs in development, including the Forest Practices HCP, which cover, among others, salmonid species. Through ESA Section 10(a)(1)(B), HCP covered lands are evaluated to determine whether the HCP (1) provides a conservation benefit to the species; (2) provides assurances that the management plans will be implemented; and (3) provides assurances the plans will be effective. Approved and permitted HCPs are designed to ensure the long-term survival of covered species within the plan area. Where there is an approved HCP, any area that would otherwise be proposed for critical habitat designation for the covered species would normally be protected through the terms of the HCP and the accompanying implementation agreements (IAs).

Further, as stated by the USFWS in their rule for critical habitat for bull trout, additional regulatory actions by the Federal government would erode the cooperative nature with landowners who have already voluntarily entered into a HCP. The USFWS stated that critical habitat designations "... *could impact the trust and spirit of cooperation that has been established over the last several years*" with the State of Washington and private landowners to where "... *Federal regulation through designation of critical habitat would be viewed as an unwarranted and unwanted intrusion.*" WDNR agrees with the determinations made by the USFWS and requests NOAA Fisheries consider these circumstances when designating critical habitat for 13 ESUs of Pacific Salmon and Steelhead.

WDNR State Lands HCP

WDNR State Lands has a multi-species HCP, which is one of the most comprehensive in the nation. It is currently the largest approved HCP in Washington State covering approximately 1.6 million acres of state trust land, or all WDNR-managed forestlands within the range of the northern spotted owl. This includes approximately 7 percent of all forestland in Washington, including all state forestland west of the Cascade Range, as well as some state forestlands on the eastern slopes of the Cascade Range. Aquatic species are not covered under the WDNR State Lands HCP on approximately 228,000 acres of state land on the east side of the Cascade Crest. Forest management activities on WDNR lands in eastern Washington follow the current Forests Practices Act and rules as they pertain to aquatic resources protection.

The WDNR State Lands HCP is the culmination of lengthy and in depth negotiations with the Services. During the HCP process, an Environmental Impact Statement (EIS) was completed which provided detailed analysis of the potential environmental effects of the HCP, including the effects on listed species. A Biological Opinion (BO) was completed by the Services in 1997, which provided additional analysis of the effects of the HCP on listed species. The USFWS amended the original BO in 1999 to include an incidental take statement for Columbia River Basin bull trout. NOAA Fisheries also amended the BO in 1999 to include incidental take statements for Lower Columbia River steelhead, Lower Columbia River and Puget Sound Chinook, Hood Canal summer run and Columbia River chum and Ozette Lake sockeye. Both Services determined that if management activities were conducted as described in the WDNR State Lands HCP, and in compliance with the IA, expected incidental take would be adequately minimized and mitigated. Further, the Services found that implementing the HCP would not appreciably reduce the likelihood of survival or recovery of the listed Distinct Population Segments (DPSs) or Evolutionary Significant Units (ESUs).

The activities covered under the WDNR State Lands HCP include, but are not limited to, forest practices, forest product sales, sale and harvest of other valuable materials, licenses, permits, leases, rights-of-way, and public use. Per the IA, WDNR has incorporated all relevant commitments of the HCP into timber and non-timber resource activities executed on or after January 1, 1999. These management activities, as well as the minimization and mitigation strategies of the HCP, were analyzed in the EIS and the subsequent BO. Therefore, all WDNR authorized management activities occurring on state forestland that could affect listed species or their habitat have been considered and analyzed through the HCP process.

Other activities occurring on state forestlands, having a federal nexus and which could potentially affect listed species or their habitats are rare, and would undergo a section 7 consultation regardless of designated critical habitat. These activities would not be associated with the State Lands HCP, rather may be associated with land in holdings managed by the Federal or tribal governments or private owners.

Given that the section 7 consultation on the State Lands HCP activities was much more extensive than section 7 consultation that would result of designating critical habitat, NOAA Fisheries

should exclude lands covered under the WDNR State Lands HCP from designation. While the benefits of exclusion outweigh the benefits of inclusion primarily from a non-economic standpoint - the opportunity to streamline regulatory compliance and confirm regulatory assurances for HCP participants; the continued ability to seek new partnerships and implement more protective conservation for nonfederal actions that may not be accomplished otherwise; and setting the stage for more collaborative conservation actions in the future, - these benefits are nonetheless very important to HCP participants and should be to NOAA Fisheries as well.

The second criterion for designating critical habitat - specific areas that may require special management consideration or protection - is addressed by the fact that the approved HCP is in place. NOAA Fisheries would not be able to secure nearly as effective conservation actions, or special management protection, through section 7 consultations alone and should acknowledge the important contribution the WDNR State Lands HCP makes to species conservation. It is inconsistent for NOAA Fisheries to approve an HCP and then follow with a critical habitat designation for the same area.

The WDNR State Lands HCP also includes a Riparian Forest Restoration Strategy component. The main objective of this strategy is to restore riparian management zone function. Restoration work will be done primarily through thinning to reduce relative stand density and shorten the amount of time necessary for riparian forests to achieve full function. Hardwood conversions will also occur where alder stands will be replaced with conifers. These restoration efforts provide increased shade, large woody debris recruitment and ultimately restored habitat for salmonids, and go beyond what is required under the ESA or what could be achieved through critical habitat designation.

The development and implementation of HCPs provides important conservation benefits. Besides those listed above, other benefits include the development of biological information to guide conservation efforts and assist in species recovery, and the creation of innovative solutions to conserve species while also allowing for otherwise lawful activities.

Proposed Forest Practices HCP

In July 2001, the Washington Forest Practices Board adopted sweeping changes to the rules governing forest practices activities on over 9 million acres of forestlands in the state. The changes, directed by the state legislature as part of the Forests and Fish Law, originally appeared as recommendations in the 1999 Forests and Fish Report (FFR) and are commonly referred to as the "Forests and Fish Rules." The FFR reflected a multi-stakeholder effort to improve forest practices and the protection of aquatic and riparian habitat on forestlands regulated under the state's Forest Practices Act and rules. The authors of the FFR include Federal agencies (USFWS, NOAA Fisheries, and EPA), state agencies (Washington State Governor's Office, WDNR, Washington Department of Fish and Wildlife, and Washington Department of Ecology) Washington counties, forest landowners, and Indian tribes.

The FFR was developed in response to listings of several stocks of Pacific salmon under the ESA, as well as the continued listing of surface waters on the Federal Clean Water Act 303(d)

list. To address these issues, the FFR recommended modifying existing forest practices statutes and rules related to: the protection of riparian areas, unstable slopes, and wetlands; the construction, maintenance, and abandonment of forest roads; the application of forest chemicals; and the implementation of watershed analysis. The report also recommended creating and implementing a collaborative, multi-million dollar adaptive management program. The Forests and Fish Emergency Rules went into effect in April 2000, and permanent rules became effective in July 2001. The revised Forest Practices rules apply to forestlands so long as harvested land will be replanted and remain in forestry.

The Forest Practices rules include riparian management zones (RMZs) on fish-bearing streams designed to recruit the majority of large wood, which potentially could be recruited from these riparian areas. Because recruitment of large wood requires buffer widths greater than that needed to address many other riparian functions, these buffers also address the riparian functions of bank stability, shade, nutrient input, and sediment filtering. Riparian buffers on fish-bearing streams likely account for half of the wood delivered to such streams. The remainder of large wood in these streams depends on episodic and catastrophic events for transport from upstream and upslope areas. Riparian buffers for perennial streams above fish-bearing streams include a buffer at the confluence with fish-bearing streams and additional buffers covering at least 50 percent of the perennial non-fish bearing stream length. Buffers on perennial non-fish-bearing streams protect sensitive reaches and sites, such as headwall and side-slope seeps, and are designed to maintain stream temperatures required by listed salmonid species. The Forest Practices rules also include a strategy for maintaining cooler water temperatures - the bull trout temperature overlay - in streams located in the hotter, dryer portions of Washington east of the Cascade crest.¹

Slope stability and the ability to harvest timber and construct roads on unstable slopes are also addressed through the Forest Practices rules. The rules identify specific types of landforms that may be susceptible to mass wasting. Forest practices applications in these areas are designated as Class IV Special and are subject to State Environmental Policy Act (SEPA) review.

Applicants must submit a SEPA Checklist along with the Forest Practices Application. In the case of unstable landforms, the checklist contains a detailed listing of potential environmental impacts associated with the proposed activity. After reviewing the proposal, consulting with other affected agencies and tribes, and considering comments received from other interested parties through the SEPA review process, DNR issues a decision under the SEPA commonly known as a "threshold determination." If DNR determines the proposed activities are likely to have a probable significant adverse impact, a "determination of significance" is issued and the applicant must prepare an EIS in accordance with SEPA requirements. If DNR determines the adverse impacts identified in the EIS are significant and reasonable measures are insufficient to mitigate the impacts, the forest practices application is denied. If DNR determines the proposed activities are not likely to have a probable significant adverse impact, a "determination of non-

¹ The WDNR has developed a draft HCP that is currently out for public comment, which covers the Washington Forest Practices Program and rules. The USFWS and NOAA Fisheries have prepared a Draft Environmental Impact Statement discussing potential environmental impacts of the HCP. The Draft EIS is also currently out for public comment.

significance” is issued and the forest practices application is approved. In many cases, DNR’s approval of a forest practices application contains “conditions” or additional requirements with which the applicant must comply. The conditions usually include protection measures that must be implemented to mitigate impacts associated with the proposal.

Road construction and maintenance is also a large part of unstable slopes regulation, requiring corrective measures to address existing problems and specific standards for new road construction. The Forest Practices rules specify nine goals for existing and new forest roads to provide for fish passage, avoid degradation of water quality and riparian habitat, prevent mass wasting, and minimize the delivery of sediment and surface runoff to all waters bodies. To address these goals, the Forest Practices rules require large forest landowners to prepare road maintenance and abandonment plans that are specifically intended to repair and/or maintain fish passage, reduce sediment-laden road drainage, reduce potential mass wasting of roads, and improve hydrologic continuity. Large forest landowners are required to submit their plans by December 2005 and upgrades to their road networks consistent with these plans must be completed by 2016. Small forest landowners² are also responsible for road maintenance and must submit road maintenance and abandonment checklists for each forest practices application.

The Forest Practices rules apply to all forestlands regulated by the Forest Practices Act and rules equally; critical habitat features, or PCEs, do not have to exist in order for protections to be in place. All streams identified as salmon bearing are offered the same protections, regardless of the presence of salmon or PCEs at the time of the management activity. Harvest and management restrictions along salmon bearing streams, even those streams without currently existing PCEs, allow forest stands in these areas to mature over time, potentially allowing them to reach a more fully functional stage. In this way, the Forest Practices rules offer protection of existing habitat features, and ultimately restore more functional habitat over time.

The permanent Forest Practices rules consistent with the FFR have been faithfully implemented since July 2001, and are monitored by the WDNR to ensure compliance by landowners and operators. Additionally, a cooperative adaptive management program was created to engage in research and monitoring to provide science-based recommendations to assist the Forest Practices Board in determining if and when it is necessary or advisable to adjust rules and guidance for protection of aquatic resources. NOAA Fisheries staff participates in the adaptive management program through the Cooperative Monitoring Evaluation and Research Committee and through the Forests and Fish Policy Committee. NOAA Fisheries staff provides technical and policy input by assisting in prioritizing research and monitoring projects, developing scientifically sound approaches to carrying out research and monitoring, interpreting findings, and formulating recommendations that are forwarded to the Forest Practices Board for consideration.

Currently, WDNR is applying to the Services for incidental take permits for the Forest Practices Program and rules. NOAA Fisheries has developed a draft Environmental Impact Statement

² For purposes of completing road maintenance and abandonment plans, small forest landowners are defined in WAC 222-24-051 as landowners with less than 500 acres of forest land in any given WDNR region.

Chief, Protected Resources Division
Enclosure
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(EIS) under NEPA for the proposed Forest Practices HCP, which analyzes environmental effects by considering the impacts to not only fish and wildlife, but also on non-wildlife resources such as water quality, air quality, and cultural resources. NOAA Fisheries will also draft a Biological Opinion (BO), as the Services did for the WDNR State Lands HCP, for the proposed action of issuing an incidental take permit. The BO will provide additional environmental effects analysis regarding implementation of the proposed Forest Practices HCP.

Summary

In summary, WDNR requests an exclusion from critical habitat designation for approved HCPS, specifically the Washington forestlands covered by the State Lands HCP. Stringent management efforts on behalf of the State of Washington offer suitable protection of salmonids and salmonid habitats making special management considerations or protection from federal law unnecessary. The State Lands HCP has already undergone extensive environmental review and section 7 consultation. As described above, the benefits of excluding these lands from critical habitat designation far outweigh the benefits of inclusion.

In addition, we request NOAA exclude from critical habitat designation, any lands or activities falling under coverage of future HCPs that may be implemented by WDNR. This exclusion would obviously take affect upon receipt of ITPs and a signed IA. We hope NOAA will seriously consider the many benefits of excluding HCP lands from critical habitat designation and honor our request.



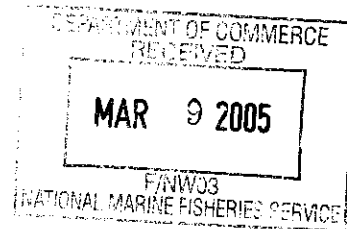
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March 3, 2005

Chief, NMFS, Protected Resources Division
525 NE Oregon Street, Suite 500
Portland, OR 97232-2737



Re: Docket Number 030716175-4327-03 and RIN number 0648-AQ77
Comments on Proposed Critical Habitat Designations for 13 Evolutionary Significant Units (ESUs)
of Pacific Salmon and Steelhead in Washington, Oregon, and Idaho.

Dear Chief:

The Green Diamond Resource Company (GDRCo) appreciates the opportunity to comment on the proposed critical habitat designations for 13 Evolutionary Significant Units (ESUs) of Pacific salmon and steelhead in Washington, Oregon, and Idaho. GDRCo is a family-owned company with a 115 year history of timberland ownership. The fifth generation of family members is now providing the leadership for the careful stewardship of the company's 870,000 plus acres of highly productive timberland that are located along the coastal regions of Washington, Oregon and California.

The company has a long history of protecting wildlife, water quality and aquatic resources on its forested lands. Green Diamond Resource Company was the first private company to develop a Habitat Conservation Plan (HCP) for the Northern Spotted Owl. The HCP was approved by the U.S. Fish and Wildlife Service (USFWS) in September of 1992, and covers over 450,000 acres of the company's ownership in northern California. More recently, the company signed a Habitat Conservation Plan (HCP) in October of 2000 that provides protection for water quality and listed and unlisted fish, aquatic, and wildlife species. The HCP covers approximately 262,000 acres of the company's ownership in Washington State. GDRCo is also actively seeking federal approval from the USFWS and NOAA Fisheries on an aquatic HCP for the company's timberlands in California.

Because of GDRCo's extensive experience in habitat management under the Endangered Species Act, we have followed closely the evolution of the Act and its implementing regulations. We recognize that the proposed critical habitat designations currently under review are the result of tremendous effort by NOAA Fisheries to correct past deficiencies in critical habitat that were identified in litigation and resolved by NOAA Fisheries' agreement to remand and reformulate the designations. It is our overall impression that NOAA Fisheries' new approach to critical habitat designation greatly improves on previous regulations by using more rigorous biological and economic methods, and by maintaining fidelity to the language and intent of the ESA.

Designation of Areas Essential for Conservation of the Species.

We applaud NOAA Fisheries for focusing the proposed designation on only those areas that are essential for the conservation of listed species and in need of special management. We note that the proposed designations have appropriately emphasized the identification of occupied habitat and the presence of primary constituent elements of habitat in those areas. We further note that NOAA Fisheries has greatly

improved its precision in defining designated areas by mapping stream reaches proposed for designation. Rather than simply describing critical habitat as accessible areas within entire river basins, the proposed designation now allows regulated interests and federal agencies to understand where critical habitat is located.

NOAA Fisheries has also appropriately eliminated prior ambiguity where riparian areas of unspecified dimensions were once designated. The use of the ordinary high water line and bank-width boundaries on rivers and streams will greatly improve the efficiency and effectiveness of consultation on critical habitat effects.

Finally, we congratulate NOAA Fisheries biologists for assessing the relative conservation contributions of various basins and sub basins within each Evolutionarily Significant Unit (ESU). This approach is consistent with the reality that not all habitat is of equal significance and value in the conservation of a listed species. The effort to differentiate and prioritize habitat will be repaid by the ability to target conservation resources and habitat protection in areas where the species will benefit most.

Meaningful Use of the Exclusion Process.

In this proposed designation, NOAA Fisheries has also made tremendous improvements in its use of the exclusion process mandated by the ESA. NOAA Fisheries has broad discretion to weigh the benefits of designation against the benefits of withholding designation for certain areas, but the exercise of that discretion must be informed. The exclusion process is far more useful now that NOAA Fisheries has made a qualitative differentiation between habitat areas coupled with a quantitative assessment of economic impacts associated with added critical habitat protection. NOAA Fisheries is now able to approach the critical habitat designation process in a manner that achieves the biological and legal mandate, protection of habitat essential for the conservation of the species, but does so in a cost-effective manner. Rather than designate all habitat everywhere without regard for economic impact or cost, NOAA has attempted to protect the best habitat while avoiding inessential adverse economic impacts. In the final designation, we urge NOAA Fisheries to adopt the proposed exclusions of units 14 and 17 for Puget Sound Chinook, where habitat conservation priorities are low and economic impacts are high. We also urge NOAA Fisheries to exclude the entire Oregon Coastal Coho ESU from designation as the species is no longer listed as threatened and the proposed relisting of the species is unwarranted. We note that NOAA is considering such an exclusion because of the healthy status of the species. In fact, the Oregon Coastal Coho ESU is not at risk of extinction, and it will remain a viable species under current management and habitat protection without listing and critical habitat designation.

NOAA's focus on a balancing of biological benefits against economic costs is an appropriate use of its exclusion discretion. NOAA has correctly refrained from adding speculative economic benefits of habitat designation into this balancing function. There is no need for NOAA to engage in the controversial and costly process of estimating economic benefits of habitat protection because the ESA requires that the designation be based only on biological benefits – the conservation of the species. Areas should not be

included in a critical habitat designation to confer economic benefits on selected interests at a great cost to others.

Recognition that Special Management Measures Are Already Provided.

The exclusion process for the proposed designations has also been improved by NOAA Fisheries' consideration of other non-economic benefits of excluding habitat from designation. Section 4(b)(2) of the ESA allows NOAA Fisheries broad discretion to exclude any area from critical habitat designation where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not jeopardize the continued existence of a listed species. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19. For example, the USFWS has typically excluded from designation areas that are specially managed under ESA-approved conservation plans such as habitat conservation plans (HCPs) and Safe Harbor Agreements approved under Section 10 of the ESA. The USFWS has long stated that in most instances the benefits of excluding areas covered by such plans will outweigh the benefits of including them. *See, e.g., Final Rule Designating Critical Habitat for the California tiger salamander*, 69 Fed. Reg. 68568, 68593 (Nov. 24, 2004) (excluding privately-owned areas already managed on a cooperative, voluntary basis for conservation of the species); *Final Rule Designating Critical Habitat for the Quino checkerspot butterfly*, 67 F.R. 18356, 18367-369 (April 15, 2002) (excluding areas managed under HCPs because the benefits of exclusion outweigh the small or non-existent benefits of inclusion).

NOAA Fisheries should join the USFWS in recognizing that special management tools such as HCPs typically provide equal or greater conservation benefits than future section 7 consultations. HCPs, for example, assure the long term protection and management of a covered species and its habitat, and funding for such management. Further, HCPs apply conservation management to nonfederal actions that would otherwise be excluded from section 7 consultation because they rarely require federal authorization or involvement. However, in those instances where there is a federal nexus with nonfederal activity, inclusion of HCP areas in critical habitat would create a *disincentive* for landowners to develop long-term conservation plans and similar voluntary efforts to go beyond minimum compliance with ESA section 9. *See, e.g., Final Rule Designating Critical Habitat for the California tiger salamander*, 69 Fed. Reg. at 68593 (recognizing inclusion of areas already managed for conservation of the species would provide disincentives for similar efforts in the future).

GDRCo urges NOAA Fisheries to follow the practice of excluding areas that are subject to existing and future approved HCPs, agreements, permits, and other forms of conservation commitments. It is our firm conviction that the areas covered by the current forest practices rules in Oregon and Washington along with the Oregon Plan for Salmon and Watersheds, the Washington Forests and Fish Rules, and GDRCo's aquatic HCP in Washington provide effective long-term special management protection for salmon and steelhead habitat and consequently should not be designated as critical habitat. Designating these areas as critical habitat and requiring additional forest management restrictions would place an unnecessary and unreasonable economic burden on private forest landowners without providing a corresponding benefit to protecting fish habitat. Rather than another regulatory burden, private forest landowners need economic

and regulatory certainty to offset the enormous costs and commitments associated with keeping their lands in forestry and protecting both listed and unlisted species of fish and wildlife.

In June of 2004, the USFWS recognized the important contribution state and private forestlands in western Washington are making to protect fish habitat and water quality by exempting from the designation of critical habitat for bull trout those areas under legally operative HCPs, draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs), and lands covered by the Washington Forests & Fish Rules. *See Final Rule Designating Critical Habitat for the Klamath River and Columbia River Populations of Bull Trout*, 69 Fed. Reg. 59996, 60025-30 (Oct. 6, 2004). HCPs and the Forest & Fish Rules were developed to provide the habitat protection and the cool clean water necessary for listed as well as unlisted fish and aquatic species. The proposal by the USFWS not to designate critical habitat for private forestland in Washington is a strong indicator of the adequacy of the Forests & Fish Rules to protect listed species, and an important indicator that Washington's state forest practices regulations meet the requirements of the federal ESA.

As an industry we've been supportive of substantive changes in forest practices rules in Oregon and Washington to protect clean water and habitat for all fish, including salmon and steelhead. In addition to adhering to rigorous forest practices rules to protect water quality and fish habitat for salmon and steelhead, GDRCo has voluntarily entered into an aquatic HCP in Washington in 2000, and has actively implemented the provisions of the Oregon Plan for Salmon and Watersheds since 1998.

Like Washington's Forests & Fish Rules, GDRCo's HCP was negotiated with and approved by the NMFS, USFWS and the Environmental Protection Agency (EPA). The Forests & Fish Rules and GDRCo's HCP addressed the needs of federally listed and unlisted fish species. Both agreements have incorporated comprehensive management practices to protect riparian habitat including large streamside buffers and restrictive operating guidelines for forestry practices near or adjacent to streams. Both agreements also require the improvement of all existing roads to limit the delivery of sediment and surface runoff water to streams, and to provide fish passage to fish in all life stages. In addition, both agreements contain adaptive management provisions that utilize scientific processes, evaluations and studies to guide any necessary changes.

GDRCo has been aggressively implementing the provisions of these agreements since they were enacted. In addition to the company's efforts, all the appropriate state and federal regulatory agencies have also been actively engaged in monitoring and enforcement activities to ensure the provisions of these agreements are being fully implemented.

Conclusion.

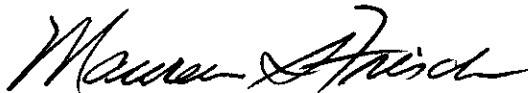
We urge NOAA Fisheries not to designate critical habitat on non-federal lands for Pacific salmon and steelhead in areas that are already effectively protected with special management considerations by HCPs, the existing comprehensive forest practices regulations in Oregon and Washington, and the voluntary actions of forest landowners under the Oregon Plan for Salmon and Watersheds. With the above-described protection in place, the designation would add another costly regulatory overlay for landowners

Green Diamond Resource Company
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without providing additional resource protection benefits. Non-federal lands are already making an enormous contribution to protect clean water and fish habitat for listed and unlisted aquatic species in Oregon and Washington. Non-federal landowners have been spending and continue to spend vast sums of money on enhanced road construction and maintenance programs, as well as increasing the size and protection standards for riparian areas. The designation of critical habitat will discourage rather than encourage non-federal landowners to retain their lands in forestry.

We hope you will carefully consider our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Maureen Frisch". The signature is fluid and cursive, with the first name "Maureen" written in a larger, more prominent script than the last name "Frisch".

Maureen S. Frisch
Vice President, Public Affairs and Human Resources

**PUBLIC COMMENTS
On
SALMON CRITICAL HABITAT**

January 18, 2005

My name is Scott Swanson. I am the Manager of West Fork Timber Company, LLC. We are a small private, family-owned timber company that is in its twelfth year of implementing a Habitat Conservation Plan (HCP) on our 55,000-acre tree farm in eastern Lewis County, WA.

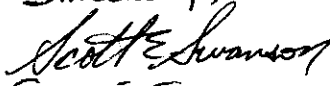
Our HCP covers all species that are found on our property, now or in the future. Our HCP provides juvenile Northern Spotted Owl dispersal habitat and, through watershed analysis, also provides additional riparian reserve areas of habitat.

Our interdisciplinary team successfully developed watershed analysis prescriptions for our entire tree farm, for all nine Watershed Administrative Units (WAU) that cover our property, during 1993 through 1999. Each one of these WAUs has had at least one 5-year review since that time. Our HCP protection measures and watershed prescriptions have focused on riparian and sensitive-slope reserve protections. These streamside protection areas have been set-aside for the 100-year life of our HCP. They help provide habitat and cool, clean water throughout our ownership.

We believe that areas that are protected by an HCP do not warrant additional critical habitat designation for salmon. We believe this would be a duplicative effort. Areas under HCP protection measures already provide conservation benefits for fish. Fish habitat and water quality are being protected on our tree farm. Adding critical habitat designations on these HCP lands are unnecessary and would be a disincentive to other forest landowners who may consider HCP protections somewhere nearby in the future.

We have been successfully protecting riparian habitat and water quality on our tree farm through these contractual protection measures and, we will continue to do so, at least through the year 2095. A critical habitat designation of HCP lands is unwarranted and unnecessary.

Thank you for your time and your consideration of this information.

Sincerely,

SCOTT E. SWANSON

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